Petition

Office - Supreme Court, U.S.
FILED
JAN 29 1982
ALEXANDER L. STEVAS,
CLERK

81-1427

No. ....
IN THE

Supreme Court of the United States

October Term, 1981

JACK LEAF and MARVIN GUNNUFSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

WALTER J. LACK, ESQ.,
ENGSTROM, LIPSCOMB & LACK,
3250 Wilshire Boulevard,
Suite 2102,
Los Angeles, Calif. 90010,
(213) 487-2240,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

No. ...

IN THE

Supreme Court of the United States

October Term, 1981

JACK LEAF and MARVIN GUNNUFSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Question Presented.

Whether the United States is liable in tort for the destruction of an aircraft owned by unwitting private citizens and used by an informant of the Drug Enforcement Agency, with full knowledge, approval and direction of D.E.A. Agents, in an aborted attempt to secure information on an international drug smuggling operation.

Parties.

The only parties in this action are those listed in the above caption.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	i
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting Writ	6
No Definitive Decision Has Been Reached as to Whether the Misrepresentation Exception to the Federal Tort Claims Act, if Applicable, Should Bar Each and Every Claim Arising Within a Commercial Setting	6
Conclusion	11
Appendix A. Opinion of the United States Court of Appeals, Ninth Circuit, Dated November 16, 1981	App. p. 1
Judgment of the United States District Court, Central District of California, Dated and Approved October 9, 1979	7
Notice of Entry of Judgment, Dated October 11, 1979	8
Findings of Fact and Conclusions of Law, filed October 9, 1979	10

TABLE OF AUTHORITIES

Cases	Page
Betesh v. United States, 400 F.Supp. 238 (D.D.C. 1974)	8
Green v. United States, 629 F.2d 581 (9th Cir. 1980)	9, 10
Hartz v. United States, 387 F.2d 870 (5th Cir. 1968)	9
Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955)	7, 10
Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2nd Cir.), cert. denied, 389 U.S. 931, 88 S.Ct. 295, 19 L.Ed.2d 292 (1967)	8
Leaf v. United States, 661 F.2d 740 (9th Cir. 1981)	9
Matthews v. United States, 456 F.2d 395 (5th Cir. 1972)	8
Neustadt v. United States, 366 U.S. 696, 81 S.Ct. 1294, 6 L.Ed.2d 614 (1961)	6, 7, 8
Preston v. United States, 596 F.2d 232 (7th Cir.) cert. denied, 444 U.S. 915, 100 S.Ct. 228, 62 L.Ed.2d 169 (1979)	10
Ramirez v. United States, 567 F.2d 854 (9th Cir. 1977)	7, 8
Sullivan v. United States, 299 F.Supp. 621 (N.D. Ala. 1968), aff'd, 411 F.2d 794 (5th Cir. 1969)	9
Yates v. United States, 497 F.2d 878 (10th Cir. 1974)	9
United Air Lines v. Wiener, 335 F.2d 379 (9th Cir. 1963), cert. dismissed, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964)	9

Statutes

Page

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1346 2
28 U.S.C. § 1346(b) 2, 3
28 U.S.C. § 2680(a) 5
28 U.S.C. § 2680(h) 2, 3, 5, 8, 9

No. ...

IN THE

Supreme Court of the United States

October Term, 1981

JACK LEAF and MARVIN GUNNUFSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JACK LEAF and MARVIN GUNNUFSON, the petitioners herein, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 16, 1981, reversing a judgment for damages entered in favor of petitioners by the United States District Court for the Central District of California and finding petitioners' claim barred by the misrepresentation exception to the Tort Claims Act.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit dated November 16, 1981, is reported at 661 F.2d 740 and is printed in Appendix A hereto, *infra*,

page 1. The judgment of the United States District Court for the Central District of California dated October 9, 1979, is printed in Appendix A hereto, *infra*, page 7. The Notice of Entry of Judgment of the United States District Court is printed in Appendix A hereto, *infra*, at page 8.

Jurisdiction.

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra*, page 1) was entered on November 16, 1981. The time of its entry is not available from the Clerk's office. The jurisdiction of the Supreme Court is invoked under 28 USC § 1254(1).

Statutory Provisions Involved.

This case involves the Federal Tort Claims Act, 28 USC § 1346, which provides in pertinent part:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

This case also involves the exception provided at 28 USC § 2680(h) to the above-cited statute:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (h) Any claim arising out of assault, battery, false

imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Statement of the Case.

This is an action for property damages brought by petitioners, Jack Leaf and Marvin Gunnufson, against the United States of America pursuant to 28 USC § 1346(b).

In January of 1973, the petitioners were introduced through a mutual acquaintance to Morris Bean. Unknown to petitioners, Bean was acting as an informant to the Drug Enforcement Agency which was at that time investigating the activities of a suspected drug smuggler, Reynaldo Church. Bean, working undercover, had formulated a plan with Church whereby a quantity of marijuana would be smuggled out of Mexico via aircraft into the United States.

Bean introduced Leaf and Gunnufson to Church representing to them that Church desired to purchase their PBY aircraft, a unique type of airplane that is extremely large and lands on either water or a conventional earth landing strip. Petitioners were told that Church was the agent for a rock music group which desired to purchase the aircraft

for recreational purposes. In fact, Bean and Church intended to utilize the aircraft in their drug smuggling scheme.

Leaf and Gunnufson subsequently agreed to lease their aircraft to Bean, whom they understood to be Church's agent, so that the music group could "try out" the aircraft prior to purchasing it. The aircraft would be leased for a test run from Arizona into Mexico; the lease payments being applied to the total purchase price of $265,000.00. Bean and Church, of course, had no intention of using the plane as represented to Leaf and Gunnufson, but intended instead to use the aircraft on a "dry run" of their smuggling plan.

In March of 1974, petitioners' plane took off from Phoenix to Mexico on this "dry run." The flight turned out to be the "real thing", however, when the plane arrived in Mexico and armed Mexicans arrived to load the plane with bales of marijuana. The plane was overloaded and damaged in an abortive take-off, the cargo was jettisoned and the aircraft was sunk at Church's direction. Bean then informed Leaf and Gunnufson of the true facts of the escapade and Leaf and Gunnufson filed their action against the United States and Morris Bean to recover for the loss of their plane. Bean was subsequently dismissed from the action without prejudice.

By Judgment dated October 9, 1979, the United States District Court for the Central District of California adjudged that Bean was an agent and employee of the United States, that the United States was liable for the destruction of petitioners' aircraft and ordered the United States to pay Leaf and Gunnufson the sum of $150,000.00, a valuation placed on the aircraft one year prior to its destruction. (The Court's Findings of Fact and Conclusions of Law are printed in Appendix A hereto, *infra*, page 10.)

In July of 1980, the United States appealed the District Court's decision, arguing that Leaf and Gunnufson had failed to establish a duty owed to them by the government or any actionable negligence which caused petitioners' damage. The government further argued that, assuming *arguendo*, the government did owe a duty to Leaf and Gunnufson, the breaches of duty found by the District Court were within exceptions to liability under the Tort Claims Act: (1) the discretionary function exception, 28 USC § 2680(a), and, (2) the misrepresentation exception, 28 USC § 2680(h). In October of 1980, Leaf and Gunnufson filed their cross-appeal to the District Court's decision, asserting that award of $150,000.00 should be increased to $265,000.00, the value of the aircraft on the date of its destruction.

In its decision dated November 16, 1981, the United States Court of Appeals for the Ninth Circuit agreed with the trial court's imposition of *respondeat superior* liability on the Government. The Court of Appeals decided, however, that misrepresentation was a significant factor relied on by Leaf and Gunnufson in maintaining their suit, and that the suit was therefore barred by the misrepresentation exception stated at 28 USC § 2680(h). In view of this disposition of the appeal, the Court of Appeals did not reach the damages issue raised in Leaf and Gunnufson's cross-appeal.

REASONS FOR GRANTING WRIT.

No Definitive Decision Has Been Reached as to Whether the Misrepresentation Exception to the Federal Tort Claims Act, if Applicable, Should Bar Each and Every Claim Arising Within a Commercial Setting.

This Court has interpreted the misrepresentation exception to the Federal Tort Claims Act to mean that in enacting the exclusion, Congress had in mind the "traditional and commonly understood" torts of negligent misrepresentation and common law deceit. *Neustadt v. United States*, 366 U.S. 696, 706-707, 711 n.26, 81 S.Ct. 1294, 6 L.Ed.2d 614 (1961). The Court in *Neustadt* explicitly recognized that the misrepresentation and deceit exclusions would arise most often in the course of business transactions. *Neustadt* held that the exclusion would bar a house purchaser's claim involving an allegedly inaccurate inspection and appraisal of a house by a Federal Housing Administration appraiser upon which the house purchaser had been induced to pay more than the property was worth. The Court commented:

> "Our conclusion neither conflicts with nor impairs the authority of *Indian Towing Co. v. United States*, 350 U.S. 51 [76 S.Ct. 122, 100 L.Ed. 48], which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not 'arise out of . . . misrepresentation,' any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of 'misrepresentation,' in the generic sense of that word, but '[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort,

> it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.' " 366 U.S. at 711.

This Court did not discuss the misrepresentation exception in *Indian Towing*, but the case has been frequently referred to in cases which do deal with the exception. In *Indian Towing*, negligence was found on behalf of the Coast Guard in permitting the light in the lighthouse to become extinguished and in not repairing the light or giving any warning that it was not functioning. This Court held that the Government was liable for damages caused, not only by the Coast Guard's negligence in operating the lighthouse, but also by its failure to give notice to vessels that the light was not functioning. The Court found that once the Coast Guard exercised its discretion to undertake the operation of the lighthouse, it was obligated to use due care to make certain that the light was kept in good working order and, if it discovered that the light was extinguished, to repair the light, in the meantime warning that it was not functioning. This case and its progeny hold, therefore, that once the Government has an affirmative duty to warn, it may be found negligent in its failure to make that warning. And as the Court in *Neustadt* suggests, acts of this type required by the Government are more properly characterized as arising out of negligence, not arising out of misrepresentation.

While the Courts have shown their tendency to apply the misrepresentation exception to claims involving commercial transactions, the Courts have been reluctant to apply the exception in two areas involving personal injury claims: medical malpractice cases and cases involving negligent flight information. In *Ramirez v. United States*, 567 F.2d 854 (9th Cir. 1977), an action was brought under the Federal

Tort Claims Act to recover for the alleged negligence of a government physician in failing to warn a patient of the risks involved in a surgical procedure. The issue in the case was whether the government physician's failure to warn of the risks constituted a misrepresentation within the meaning of the exception. The District Court, relying on two of the Ninth Circuit's earlier decisions, dismissed the action on the ground that a failure to warn constituted a misrepresentation and, as such, the tort was not actionable against the United States. The Court of Appeals determined that the two cases relied on by the government were inconsistent with the Supreme Court's opinion in *Neustadt* and the history of § 2680(h). They, therefore, held that the misrepresentation exception would not apply and reversed the District Court's decision. *See also, Betesh v. United States*, 400 F.Supp. 238 (D.D.C. 1974).

The Court in *Matthews v. United States*, 456 F.2d 395 (5th Cir. 1972), summarized the decisions in the malpractice cases, pointing out that although a communicated diagnosis, with nothing more, came within the § 2680(h) exception, the opposite result was reached when a physician was under a duty to proceed further and treat a patient, recovery being permitted on the theory of a breach of a duty to render proper treatment.

Courts have avoided application of the exception in negligent flight information cases by either finding that the government violated its duty to warn or by viewing the air controller's advice as an "operational task" rather than as a misrepresentation. The Court in *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2nd Cir.), *cert. denied*, 389 U.S. 931, 88 S.Ct. 295, 19 L.Ed.2d 292 (1967), found that the plaintiff's claim was not barred by the exception when the F.A.A. air traffic controllers had a duty to warn pilots about the weather and where the controller's failure to inform

incoming traffic was a violation of an F.A.A. directive. The controller's duty was characterized as an "operational task" rather than as a negligent misrepresentation.

The Fifth and Tenth Circuit Courts have likewise held that a plaintiff's claim will not be barred when the air traffic controllers have an affirmative duty to warn pilots of changing atmospheric conditions. *Yates v. United States*, 497 F.2d 878 (10th Cir. 1974); *Hartz v. United States*, 387 F.2d 870 (5th Cir. 1968). Courts have further construed both the preparation and circulation of flight charts and the failure to make a study of commercial passenger air traffic as "operational tasks" rather than negligent misrepresentation and, hence, not within the § 2680(h) exception. *Sullivan v. United States*, 299 F.Supp. 621 (N.D. Ala. 1968), *aff'd*, 411 F.2d 794 (5th Cir. 1969); *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1963), *cert. dismissed*, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964).

In the action below, District Judge Peirson Hall specifically distinguished the underlying action from a misrepresentation one, and found the United States liable for the loss of plaintiff's aircraft in that the D.E.A. Agents had an affirmative duty to warn of the nature of their mission. The Court of Appeals determined, however, that misrepresentation was at the heart of plaintiff's complaint and cited *Green v. United States*, 629 F.2d 581 (9th Cir. 1980), for the proposition that the misrepresentation exception to the Tort Claims Act:

> ". . . precludes liability where the plaintiff suffers economic loss as a result of a commercial decision which was based on a misrepresentation by government consisting either of false statements or a failure to provide information which it had a duty to provide." *Leaf v. United States*, 661 F.2d 740, 742 (1981).

The Court in *Green* had reached the conclusion that in applying the misrepresentation exception, the question was not whether the government was guilty of an affirmative misstatement or merely of an omission. Nor did they find the existence of a specific duty to warn the decisive factor. The Court found, rather, that the applicability of the exception depended on the commercial setting within which the economic loss arose. To support this conclusion, the Court cited *Preston v. United States*, 596 F.2d 232 (7th Cir. 1979), wherein the Court declared that the test was "not whether the injury was economic, but whether it resulted from a commercial decision based on a government misrepresentation." *Green v. United States, supra*, 629 F.2d at 584. In reaching its conclusion, however, the Court in *Green* noted that the "decisions in this area may not be fully reconcilable", 629 F.2d at 585, and went on to note the decisions reached in the air traffic controller and medical services cases.

Petitioners respectfully request this Court to reconcile the decision reached in *Indian Hill, supra*, and its progeny, particularly the medical malpractice and negligent flight cases cited above wherein it was determined that the misrepresentation exception would not apply, with those cases wherein the Court has determined that the misrepresentation exception would apply, notwithstanding the Court's finding of an affirmative duty to warn, when the claim arose in a commercial setting. Petitioners respectfully submit that the underlying reasons set forth by the Courts in those cases wherein the exception was found not to apply may likewise be applicable in cases involving a commercial or financial setting. Petitioners suggest that in cases such as theirs wherein the Court finds an affirmative duty to warn on behalf of the government, the claim should not be summarily

barred by the misrepresentation exception merely because the underlying claim arises out of a commercial setting as opposed to a personal injury.

Conclusion.

WHEREFORE, Petitioners pray that a Writ of Certiorari be issued from this Honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed and that the cause be remanded for review of the issues raised in Petitioner's cross-appeal for damages.

Respectfully submitted,

WALTER J. LACK, ESQ.,
ENGSTROM, LIPSCOMB & LACK,
Attorneys for Petitioners.

Appendix

APPENDIX A.

Opinion of the United States Court of Appeals, Ninth Circuit.

Jack Leaf and Marvin Gunnufson, Plaintiffs-Appellees and Cross-Appellants, v. United States of America, Defendant-Appellant and Cross-Appellee. Nos. 79-3831, 80-5013.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 5, 1981. Decided Nov. 16, 1981.

Government appealed from a judgment of the United States District Court for the Central District of California, Peirson M. Hall, J., which awarded damages to plaintiffs for destruction of their aircraft while being used by a DEA informant with knowledge and approval of the DEA agents assigned to supervise him. The Court of Appeals, Chambers, Circuit Judge, held that owners of aircraft, which was leased to DEA informant based upon misrepresentations as to its intended use and which was destroyed while being used by informant with knowledge and approval of DEA agents assigned to supervise him, were barred by misrepresentation exception to Tort Claims Act from seeking recovery from the government.

Reversed.

Kenneth L. Crowder, Engstrom, Lipscomb & Lack, Los Angeles, Cal., argued, for Leaf & Gunnufson; Walter J. Lack, & Marylin Jenkins White, Los Angeles, Cal., on brief.

Susan Sleiter, Washington, D. C., for United States.

Appeal from the United States District Court for the Central District of California.

Before CHAMBERS and ANDERSON, Circuit Judges, and BILBY,* District Judge.

CHAMBERS, Circuit Judge:

The government appeals from a judgment awarding damages to plaintiffs in the amount of $150,000, for the destruction of their PBY aircraft while it was being used by a DEA informant named Morris Bean, with the knowledge and approval of the DEA agents assigned to supervise him. The government claims that, contrary to the trial judge's findings, Bean was not an "agent" of the government so as to impose respondeat superior liability on the government.

The record discloses a man who is not the run-of-the-mill informant who is used to buy and sell drugs, generally out of fear of arrest or prosecution if he does not cooperate with the government. Bean, rather accurately, describes himself as a "Walter Mitty" type who was excited by the prospect of adventure and offered his services as a citizen; he was under no threat of criminal prosecution. Moreover, he tells of drug-related problems in people close to him which led him to enter the battle against the drug traffic. By profession he rebuilt helicopters, he had a private pilot's license, and he had contacts with others in the aircraft trade. Presumably, because of this he was sought out by drug smugglers.

Having worked already on one smuggling case with the DEA, Bean was enthusiastic about further covert activity. When another smuggler sought his assistance, he reported the conversation to the DEA agents supervising him and, with their approval, he threw himself into the new adventure. With the full knowledge and approval of his supervisors, he suggested to the drug smuggler that a PBY aircraft

---

*The Honorable Richard M. Bilby, United States District Judge for the District of Arizona, sitting by designation.

should be obtained because of its flexibility in landing on both land and water. Then, still with his supervisors' knowledge and approval, he suggested to the smuggler that he knew of such a PBY (i. e., the plaintiffs'); in order to entice them to purchase it he intentionally overstated its load-bearing capacity, he introduced the smuggler to the plaintiffs, he gave the plaintiffs a totally false story that the plane was to be used by a rock music group for recreational purposes, he never told the plaintiffs of its true intended use, he participated in drawing up a lease to permit the smuggler to test the plane prior to purchase, he signed the lease as agent of the smuggler, he co-piloted the plane from California to Arizona, and registered the plane under his own name at the Phoenix airport. He also co-piloted the leased plane on a "test run" to Mexico which turned out to be the "real thing". Armed Mexicans arrived to load the plane with bales of marijuana. It was overloaded and was damaged in an abortive take-off, the cargo was jettisoned, and the plane was then scuttled as Bean and his companions fled to avoid capture by the Mexican authorities.

The government argues that Bean was a "volunteer" in the strict sense of the word and that his activities, and the resulting damage, could not be imputed to the government. Cases are cited which arose in significantly different factual settings, e. g., *Slagle v. United States*, 612 F.2d 1157 (9th Cir. 1980), involving a routine drug informant engaged in a drug sale. The district judge rejected the government's defense on this issue and found that an agency relationship existed. Another trier of fact might have come to a different result, but this trier of fact found agency and we cannot say the record does not support him.

Our difficulty with the case is not so much on the issue of agency. It is on the question of the statutory limitations on government tort liability found in 28 U.S.C. § 2680(h),

the so-called "misrepresentation exception" which precludes relief under the Tort Claims Act for, "Any claim arising out of . . . misrepresentation . . . ."

Plaintiffs have attempted to cast their complaint in words of negligence related to the obtaining of the custody of the PBY aircraft. It alleges that pursuant to a plan:

> "proposed, discussed, approved, funded, controlled and implemented by agents of the Drug Enforcement Administration, Plaintiffs were persuaded to voluntarily give custody of the aircraft to Defendants . . . ."

The complaint also alleges, inter alia, that the defendants' negligence included:

> "Failure to exercise reasonable care in disclosing to Plaintiffs the true intended uses contemplated by Defendants for the aircraft in question."

The district judge's findings indicate how basic to the plaintiffs' case was the failure of Bean or the DEA agents to advise the plaintiff-lessors of the intended use of their plane. Finding No. 4 states: "At no time prior to the destruction of the PBY did BEAN, or any agent of the DEA, inform plaintiffs LEAF and/or GUNNUFSON of the true use to which the PBY was to be put." Finding No. 6 states that the "true purpose of BEAN in obtaining possession of the PBY was to fly a simulated drug run mission into and out of Mexico . . . ." Finding No. 9 states that the agents supervising Bean's activities were aware when they authorized the Mexican mission "of the prior loss and destruction of two other aircraft in Mexico by the prime suspect involved in the simulated drug-running mission . . . and of the generally great risk to persons and property involved in drug-related activity in Mexico." Finding No. 14 states that the DEA and Bean were negligent in several particulars, among which were: "(3) Failing to advise the plaintiffs of the true purpose and circumstances of the flight"; and of "(5) Fail-

ure to advise Leaf and Gunnufson of the purpose and use to which they, at all times, planned its [the PBY's] use and purpose."

The misrepresentation exception to the Tort Claims Act:

> ". . . precludes liability where the plaintiff suffers economic loss as a result of a commercial decision which was based on a misrepresentation by government consisting either of false statements or a failure to provide information which it had a duty to provide." *Green v. United States*, 629 F.2d 581 (9th Cir. 1980).

In this case there was misrepresentation as to the intended use of the aircraft when it was leased from plaintiffs. It is clear that misrepresentation is an issue at the heart of plaintiffs' complaint, however deftly they have attempted to avoid using the word. Bean's admittedly intentional misrepresentations to plaintiffs were clearly within the chain of causative events upon which plaintiffs' claim is founded, and thus within the misrepresentation exception. *Redmond v. United States*, 518 F.2d 811, 814-816 (7th Cir. 1975). Put another way, misrepresentation was definitely a significant factor relied upon by plaintiffs in maintaining their suit, and the suit is therefore barred by the misrepresentation exception stated in 28 U.S.C. § 2680(h). *Bor-Son Bldg. Corp. v. Heller*, 572 F.2d 174 (8th Cir. 1978).

We cannot condone the activity of the government, either through the informer or the agents supervising his activities. But the plaintiffs claim damages resulting from a commercial decision to lease their aircraft, based on misrepresentations of a government agent. The government has not consented to be sued for such damages; the exception of Section 2680(h) applies to bar any recovery by the plaintiffs under the Tort Claims Act.

In view of this disposition of the appeal from the judgment, we do not reach the damages issue raised in plaintiffs' cross-complaint.

REVERSED.

Judgment.

The United States District Court, Central District of California.

Jack Leaf and Marvin Gunnafson, Plaintiffs, vs. The United States of America, Defendant. CV 75-2439-PH.

Filed: October 9, 1979.

This action came on for trial before the Court, the Honorable Peirson M. Hall, Senior District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the defendant The United States of America is found liable and that the plaintiffs JACK LEAF and MARVIN GUNNAFSON recover of the defendant The United States of America the sum of $150,000.00 with interest thereon at the rate of seven percent as provided by law, and their costs of action in the amount of $_____ .

DATED: October 9, 1979, at Los Angeles, California.

EDWARD M. KRITZMAN, CLERK
By /s/ Thelma L. Alden
Thelma L. Alden, Deputy

APPROVED: October 9, 1979
/s/ Peirson M. Hall
PEIRSON M. HALL, JUDGE

Notice of Entry.

United States District Court, Central District of California.

Jack Leaf et al., Plaintiff(s) vs. USA et al., Defendant(s). CV 75-2439-PH.

To the Above Named Parties and to Their Attorney(s) of Record:

You are hereby notified that judgment in the above entitled case was entered in the docket on 10-11-79.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on 10-11-79, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in seaied envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Walter J. Lack
3250 Wilshire Blvd.
Los Angeles, CA 90010

AUSA — Stotter
Walter B. Nash III
8th Fl., So. Arizona Bank
Financial Center
5151 E. Broadway
Tucson, AZ 85711

EDWARD M. KRITZMAN, CLERK
By /s/ Layette Fisher
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Jack Leaf and Marvin Gunnufson, Plaintiffs, vs. United States of America and Morris Bean, Defendants. Case No. CV 75 2439 PH.

Filed: October 9, 1979.

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the court hereby sets forth its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. PBY aircraft N5583V was wholly owned by plaintiffs JACK LEAF and MARVIN GUNNUFSON at the time of its destruction on March 19, 1974.

2. MORRIS BEAN was a cooperating individual/informant for the Drug Enforcement Administration (DEA) and followed the advice, suggestions, instructions, and orders of DEA statutory Agents PHILIP JORDAN and WILLIAM D. GREENLEE in his DEA undercover activities prior to, during, and after the events involving the PBY which rise to this lawsuit.

3. BEAN obtained possession of the PBY from plaintiffs LEAF and GUNNUFSON in February, 1974.

4. At no time prior to the destruction of the PBY did BEAN, or any Agent of the DEA, inform plaintiffs LEAF and/or GUNNUFSON of the true use to which the PBY was to be put.

5. BEAN kept his supervising DEA Agents JORDAN and GREENLEE continually and timely informed of all his activities relative to the PBY and the planned "dry run" mission.

6. The true purpose of BEAN in obtaining possession of the PBY was to fly a simulated drug-run mission into and out of Mexico in conjunction with known narcotic smugglers for the further purpose of obtaining information for the DEA on those suspects, their activities and sources of contraband for the ultimate purpose of the DEA in obtaining criminal indictments against those suspects or eradicating the sources of contraband.

7. The primary purpose of the flight on which the PBY was destroyed as detailed in 6, above, was to benefit the DEA in the enforcement of the narcotics laws of the United States.

8. DEA Agents JORDAN and GREENLEE were fully advised by BEAN concerning the proposed purpose of the PBY flight and approved and authorized the simulated drug-running mission.

9. At the time of their approval and authorization of the simulated drug-running mission, DEA Agents JORDAN and GREENLEE were aware of the prior loss and destruction of two other aircraft in Mexico by the prime suspect involved in the simulated drug-running mission, REYNALDO CHURCH, and of the generally great risk to persons and property involved in drug-related activity in Mexico.

10. DEA Agent GREENLEE was charged with responsibility for maintaining surveillance over the aircraft on March 13, 1974. He slept through the scheduled time of takeoff of the PBY from Phoenix, Arizona on March 13, 1974 and thereby failed to conduct his planned surveillance of that takeoff.

11. The DEA maintained a network of Agents within the country of Mexico for the purpose of enforcing narcotic laws of the U.S.A.

12. At no time prior to the destruction of the PBY did the DEA alert any of its agents in Mexico to the presence or purpose of the PBY in Mexico or warn them to conduct surveillance on it while it was in Mexico.

13. The PBY was sunk in the Infiernillo Reservoir in Mexico on March 19, 1974.

14. The DEA and BEAN were negligent in numerous particulars all of which proximately caused the destruction of plaintiffs' PBY. These particulars include, but are not limited to, the following:

(1) Permitting the PBY to be flown to Mexico;

(2) Failing to alert its Agents in Mexico to the presence of the PBY in Mexico and to its mission;

(3) Failing to advise the plaintiffs of the true purpose and circumstances of the flight;

(4) Failure to maintain adequate surveillance of the PBY while in Phoenix, Arizona and Long Beach, California.

(5) Failure to advise Leaf or Gunnufson of the purpose and use to which they, at all times, planned its use and purpose.

15. The defendant, acting through the DEA, became a bailee of plaintiff's property from the moment plaintiffs relinquished control of the PBY to BEAN until the aircraft's total destruction.

16. The directors of the corporation which owned the PBY in 1973 adopted a corporate resolution authorizing a sale of plaintiff's PBY for not less than One Hundred Fifty Thousand Dollars ($150,000.00).

17. The foregoing Findings of Fact, to the extent they are deemed to be Conclusions of Law, are hereby incorporated into the Conclusions of Law.

CONCLUSIONS OF LAW

The foregoing Findings of Fact, to the extent they are deemed to be Conclusions of Law, are hereby incorporated into these Conclusions of Law.

1. The UNITED STATES OF AMERICA (USA), acting through the DRUG ENFORCEMENT ADMINISTRATION (DEA) and its Agents, owes a duty of due care toward plaintiffs and their property pursuant to *California Civil Code*, Section 1714.

2. The USA, acting through the DEA and its Agents, owes a duty of due care to the plaintiffs and their property pursuant to *Arizona Revised Statutes*, Section 1-215(a) which defines negligence.

3. The USA, acting through the DEA and its Agents, has a duty of due care to guard against damage to or destruction of the private property of its citizens pursuant to the *DEA Agents Manual*, Section 4101.1 (Exhibit 24).

4. The USA, acting through the DEA, has a duty as a bailee of private property to properly care for that private property pursuant to *California Civil Code*, Section 1886.

5. The degree of duty toward private property charged to the USA is directly proportional to the risk to which that private property is likely to be exposed.

6. The USA has a duty of great care toward private property bailed to it for its sole benefit pursuant to *California Civil Code*, Section 1886. (See also *Baugh v. Rogers*, 24 C.2d 200 (1944)). This is especially true when the property is to be used to gather information about narcotics smugglers within the country of Mexico and the USA.

7. PHILIP JORDAN and WILLIAM GREENLEE were Agents of the Drug Enforcement Administration (DEA), acting within the course and scope of their agency and

employment and as such their acts and omissions are chargeable to the USA on the theory of *respondeat superior*.

8. MORRIS BEAN was an agent and employee of the USA pursuant to the principles of Agency Law and was acting within the course and scope of his agency and employment and as such his acts and omissions are chargeable to the USA based pursuant to 28 USCA, Section 1346(b).

9. None of the exceptions to the Federal Tort Claim Act found in 28 USCA, Section 2680 have application to the facts in this case.

10. The USA became a bailee of the PBY when BEAN acquired possession of it from plaintiffs JACK LEAF and MARVIN GUNNUFSON and flew it from Long Beach, California to Phoenix, Arizona for the purpose of taking it into Mexico on a simulated drug-running mission.

11. The USA owed to LEAF and GUNNUFSON a duty of both great and ordinary care toward the protection of their PBY.

12. The USA breached its duty of care owed to LEAF and GUNNUFSON toward the protection of their PBY.

13. The proximate cause of the total destruction of plaintiffs' aircraft was the negligence of the defendants.

14. While destruction of plaintiffs' aircraft occurred within Mexico, the acts and omissions of the DEA and BEAN proximately causing the destruction occurred within the States of California and Arizona.

15. Neither LEAF nor GUNNUFSON nor anyone acting on their behalf was negligent in any way that proximately caused or contributed to their loss suffered through destruction of the PBY.

16. The foregoing Conclusions of Law, to the extent that they constitute Findings of Fact, are hereby incorporated into the Findings of Fact.

Dated: Oct. 9, 1979.

PEIRSON M. HALL
PEIRSON M. HALL
United States District Court
Judge

Opposition

Office - Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1427

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK LEAF AND MARVIN GUNNUFSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Green v. *United States*, 629 F. 2d 581 3

Indian Towing Co. v. *United States*, 350 U.S. 61 3-4

Preston v. *United States*, 596 F. 2d 232, cert. denied, 444 U.S. 915 3

Redmond v. *United States*, 518 F. 2d 811 3

United States v. *Neustadt*, 366 U.S. 696 3-4

Statutes:

Federal Tort Claims Act:

28 U.S.C. 1346(b) 4

28 U.S.C. 2671 *et seq.* 2

28 U.S.C. 2680(h) 1, 2

28 U.S.C. 2680(k) 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1427

JACK LEAF AND MARVIN GUNNUFSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the decision of the court of appeals that their suit against the United States is barred by the "misrepresentation" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h).

1. In March 1974, petitioners negotiated the sale of their amphibious PBY aircraft with Morris Bean, who unknown to them was a government informant working on a drug smuggling case (Pet. App. 3). Bean was negotiating on behalf of Reynaldo Church, who Bean told petitioners was a musician in a "rock and roll" band, but who in fact was a drug smuggler. Bean convinced petitioners to allow Church to lease the plane for a test flight to see if it would suit Church's needs (*ibid.*). At the time he made these representations to petitioners, Bean knew that Church intended to

take the airplane to Mexico for a "dry-run" of the smuggling operation (*ibid.*). In addition, agents of the Drug Enforcement Administration supervising Bean's activities knew of the intended use of the aircraft, but did not disclose this information to petitioners (*ibid.*).

During the test run, Church directed the plane to land on an isolated lake in Mexico and, contrary to the plan, a group of armed Mexicans approached and overloaded the plane with marijuana (Pet. App. 3). The aircraft was damaged during the attempt to take off, and Church ordered it sunk to avoid detection by Mexican authorities (*ibid.*).

2. Petitioners filed the instant suit under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, against the United States in the United States District Court for the Central District of California. After trial,[1] the district court found that Bean was a government employee and that the United States was negligent because, among other reasons, it deceived petitioners as to the true purpose for which the plane would be used (Pet. App. 10-14). The court awarded $150,000 in damages.

The court of appeals reversed (Pet. App. 1-6). The court held that, although the government was responsible for Bean's conduct, petitioners' recovery was barred by the "misrepresentation" exception to the Tort Claims Act, 28 U.S.C. 2680(h) (Pet. App. 4-5).

3. Petitioners ask (Pet. 6-11) the Court to "reconcile" decisions that have found the misrepresentation exception applicable to cases such as theirs with other decisions that

---

[1]The district court originally granted summary judgment to the United States under the "foreign country" exception to the Act (28 U.S.C. 2680(k)) and because of lack of proximate cause. The court of appeals reversed and remanded the case (588 F. 2d 733 (9th Cir. 1978)).

have held it inapplicable to plainly distinguishable situations (Pet. 10). But there is no conflict between these decisions and thus no question warranting this Court's attention.

In *United States* v. *Neustadt*, 366 U.S. 696, 706-707 (1961), the Court explained that the Act's misrepresentation exclusion was created by Congress to cover situations in which plaintiffs allege that the government has breached its obligation "to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs * * *." This rule has been applied by the courts of appeals in circumstances either identical or analogous to those existing here. See, *e.g.*, *Green* v. *United States*, 629 F. 2d 581 (9th Cir. 1980) (government not liable for omissions or misstatements made regarding effects on livestock of pesticide spraying); *Preston* v. *United States*, 596 F. 2d 232 (7th Cir.), cert. denied, 444 U.S. 915 (1979) (no government liability for failure to warn that a grain storage company was in financial straits); *Redmond* v. *United States*, 518 F. 2d 811 (7th Cir. 1975 (misrepresentation exception applies when government does not warn investor of expected criminal conduct by a securities dealer). Indeed, since Bean's deception lies "at the heart of [petitioners'] complaint" (Pet. App. 5), it is difficult to imagine a more appropriate case for the application of the misrepresentation exception.

Petitioners contend (Pet. 7-9) that the holding in this case conflicts with decisions of other courts that have declined to apply the exception to suits involving negligent operation of a lighthouse, medical malpractice, or failure to provide timely flight data. This Court, however, distinguished those situations in *Neustadt* itself by pointing out that in cases such as *Indian Towing Co.* v. *United States*, 350 U.S. 61

(1955), which concerned the negligent operation of a lighthouse, the fault of the government simply did not involve any misrepresentations. 366 U.S. at 711 n.26. By contrast, the "wrongful act or omission" (28 U.S.C. 1346(b)) in this case plainly involved a misrepresentation.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1982

---

[2]The United States has filed a petition for a writ of certiorari in *Block* v. *Neal*, No. 81-1494 (filed Feb. 9, 1982), which concerns the proper interpretation of Section 2680(h). The issue in that case is whether the misrepresentation exception applies where the misstatements are based on negligently acquired information. In this case the claim is one for deliberate concealment of the truth. Thus, disposition of this petition should not be affected by the Court's treatment of the petition in *Neal*.

DOJ-1983-04